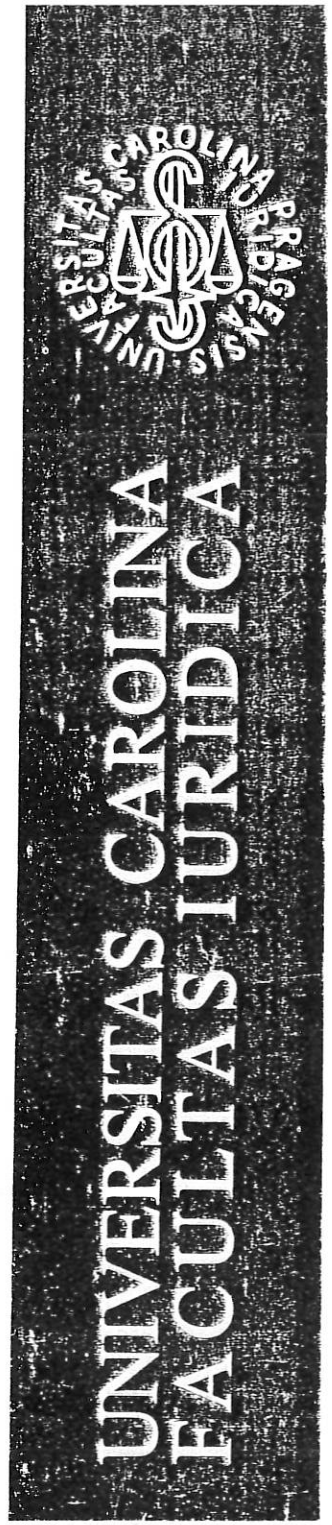

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Mutual recognition and procedural safeguards: the Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings in the European Union [1]

Lorena Winter Bachmaier

1. Introduction

On 28. 04. 2004, the European Commission presented a Proposal for a framework decision on certain procedural rights that should apply to suspects arrested or charged with a criminal offence in criminal proceedings throughout the European Union. The declared aim of this Proposal was to promote and enhance the compliance with the fundamental rights in criminal proceedings. According to the Explanatory Memorandum of the draft framework decision (hereafter PFD), "the proposal seeks to enhance the rights of all suspects and defendants generally..., offering an equivalent level of protection throughout the European Union" (point 7 E.M.). Furthermore, the definition of certain common minimum standards should facilitate the application of the principle of mutual recognition.

This paper will point out some of the questions raised by this hotly discussed document and will try to explain why there are so many difficulties to find an agreement on a document which defines fundamental rights that all European countries affirm to recognize and respect. In order to understand the scope of the controversy, and prior to discussing up to what extent the proposed framework decision can be useful, we will first begin by explaining which are the antecedents of this proposal.

2. The background

When we try to identify the factors that led the Commission to present the draft framework decision on procedural safeguards in 2004, we can point out, among others, two facts that may have prompted the elaboration of, first, the Green Paper on "procedural safeguards for suspects and defendants" and, later, of the PFD for the regulation of a common standard on procedural rights in criminal proceedings. These facts are:

1) The project to establish a European Public Prosecutor; and
2) The adoption of the principle of mutual recognition as the "cornerstone" of judicial cooperation.

1) Aware of the necessity to increase the measures to protect the financial interests of the European Community, the Commission has kept on studying the different possibilities to create an effective instrument for combating offences against the

[1] This paper has been prepared within the research Project «Integración europea y armonización de las garantías fundamentales» (SEJ2005-05719), funded by the Spanish Ministry of Education.

Union's financial interests. On 11. 12. 2001, the Commission published the "Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor".[2] The Green Paper addresses the legal status and organisation of the European Prosecutor and questions relating to the definition of offences, procedures and the Prosecutor's relations with other players. The establishment of the European Public Prosecutor should overcome the main obstacle to a really effective repression of fraud, which is the fragmentation of the European criminal law-enforcement area; this was implicitly recognized by the European draft Constitution.[3] Since the proposal to create a European Public Prosecutor there was a keen debate on questions such as: how this office should be structured, the necessity to safeguard its independence, its democratic legitimacy and the ways to control its functioning. Even more interesting for us is the discussion that arose in relation to the right to defence as well as to the possible lack of balance between a supranational public prosecutor and a national based defence. The project for a European Public Prosecutor posed an important question: if the European institutions were perhaps focusing too much on security to the detriment of the emphasis on justice and on the freedom of citizens. The establishment of instruments that facilitate a cross-border criminal prosecution should not be done at the cost of reducing the procedural safeguards and the right of defence in criminal proceedings. Therefore, it is not surprising that, to counterbalance the existence of a powerful supranational prosecutor, some scholars have claimed for an equivalent supranational defence institution that makes possible to keep a fair equality of arms between prosecutor and defendant in criminal proceedings.[4] In any event, the establishment of a powerful European Prosecutor should not be accepted until the procedural safeguards of the suspect or defendant are adequately implemented in all European countries.

2) While working gradually on the harmonization of material as well as procedural criminal laws, and until the European conventions signed in criminal matters enter into force, the Commission has focused on the implementation of the principle of mutual recognition of judicial decisions. The conclusions of European Council of Tampere declared that the principle of mutual recognition should become the "cornerstone" of judicial cooperation[5] and that the enhancement of this principle should facilitate the judicial protection of individual rights (point 33).

[2] COM (2001) 715 final, 11. 12. 2001.

[3] Article III-175 of the draft Constitution provides that the European Public Prosecutor's Office may be established specifically to combat crimes affecting the financial interests of the Union. But the European Council may, at the same time or subsequently, adopt a European decision extending the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension.

[4] See the proposal to create a "Eurodefensor" by B. Schüneman "Fortschritte und Fehltritte in der Strafrechtspflege der EU" *GA*, págs. 193 - 209, 208.

[5] Conclusions of the Presidency, European Council of Tampere, 15 y 16. 10. 1999, point 33.

The programme of measures to implement the principle of mutual recognition[6] also recognized that the implementation of this principle is highly dependent on "parameters" or conditions that have an influence on the headed mutual trust, such as "the mechanisms for safeguarding the rights of third parties, victims and suspects; and "the definition of minimum common standards". Finally, art. III-171 of the draft Treaty of the European Constitution states that the judicial cooperation in criminal matters shall be based on the principle on mutual recognition and that, in order to facilitate the mutual recognition of judicial decisions, European framework decisions "may establish minimum rules concerning... the rights of individuals in criminal procedure".[7] In all these documents it can be seen that the European institutions are aware that the application of the principle of mutual recognition needs to go hand in hand with adequate mechanisms to safeguard the rights of the suspects or accused in criminal proceedings. The Commission identified the necessity to set a minimum standard of protection for individual rights as a counterbalance to judicial cooperation measures. However, while a great number of European instruments based on the principle of mutual recognition have been approved to enhance the judicial cooperation in criminal matters, no clear steps have been taken in order to promote the effective protection of the individuals' rights. This is one of the main reasons why the principle of mutual recognition has been subject to strong criticism. In particular, the application of the European arrest warrant[8] raises great concern with regard to the rights of defence of the arrested person in the requesting as well as in the executing country. On the other hand, criminal proceedings with cross-border elements present also special features with regard to the defence of the person charged with an offence, as the right of defence can be hampered by linguistic barriers as well as by the ignorance of the foreign legal system or by the difficulties to access to legal assistance.

The Commission started by identifying the "basic" procedural rights and safeguards which should be addressed within a priority action to enhance the needed mutual trust and confidence. The study started with a broad questionnaire sent to the Member States to elaborate the working papers. The result of the consultation process was published in the Green Paper from the Commission of 19. 2. 2003 on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union,[9] which may be considered the direct background of the present PFD. The Green Paper focused on five priority areas, which later formed the content of the PFD on certain procedural safeguards. This does not mean that these five rights are more important

[6] Programme of measures (of the Council and Commission) to implement the principle of mutual recognition on decisions of criminal matters, DO C 12/10 15. 1. 2001.

[7] Art. III- 171.2: In order to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, European framework laws may establish minimum rules concerning: ... (b) the rights of individuals in criminal proceedings.

[8] Council Framework Decision of 13 June 2002, on the European arrest warrant and the surrender procedures between Member Status, DO L 190/1 de 18. 7. 2002.

[9] COM (2003) 75 final.

than others, but, as affirmed in the Explanatory Memórandum of the PFD, "they are more immediately relevant to mutual recognition and the problems that have arisen to date in the discussion of mutual recognition measures" (point 25 E.M.) and they "have a transnational element" (point 24 E.M.). The fundamental rights regulated in the 19 articles that constituted the text of the proposal of April 2004 were the following:

- Right to legal assistance and representation, which can be considered the basic right to guarantee the other procedural safeguards and which does not exclude the right to self-defence.
- Right to a free interpreter and/or translator in order to guarantee that the suspect or accused understands the charges and the procedure and may prepare the adequate defence.
- Proper protection for especially vulnerable people
- Right to communicate the detention to the family, the place of employment or the consular authorities if the suspect is a foreigner.
- Right to be informed about the rights of the suspect through a letter of rights.

3. Some remarks on the content of the framework decision

As explained in the text of the PFD, this instrument is aimed at setting "a common minimum standard" as a counterbalance to judicial cooperation measures. Consequently, it is a text of minimums, without any intention of including all the procedural safeguards that apply – or should apply – in criminal proceedings as stated by the European Convention on Human Rights. More precisely, certain procedural guarantees clearly remain out of this framework decision, for they were previously excluded from the Green Paper: [10]

- the right to bail and the conditions of detention, which will be treated as a single issue;
- the fairness in the gathering, handling and use of evidence, which should be dealt with in a separate measure as it was considered to be too vast to be addressed in the Green Paper;
- the presumption of innocence. On 26. 04. 2006, the Commission presented the Green Paper on the Presumption of Innocence to address the protection of rights that are envisaged under this principle. [11]
- ne bis in idem;
- and the judgments *in absentia*, not considered to be among the priorities.

With regard to the content of the PFD, we will only point out some of the issues that appear to be more controversial, especially in relation with the right to legal assistance.

[10] See Green Paper COM (2003) 75 final, 19. 2. 2003, point 2.6 E.M.
[11] COM (2006) 174 final, 26. 4. 2006.

3.1 The right to legal assistance

The right to be advised and represented by a qualified lawyer is regulated in articles 2 to 5 of the proposed framework decision. Article 2 PFD provides that the suspect has the right to legal counsel "as soon as possible" and "before answering questions in relation to the charge", but according to art. 1 PFD, the suspect's rights "arise from the moment when he is informed by the competent authorities". How should these precepts be understood? What happens if the authorities do not inform promptly the suspect that he is under suspicion of having committed a crime and intentionally delay that information? Which would be the consequences if the person that informs the suspect in compliance with art. 1.2 PFD is not "the competent authority"? These are only some of the questions that arise from the text of art. 1 and 2 of the PFD. Thus, its not clear enough when the right to legal counsel has to be recognized to the suspect, for the provisions of PDF are somewhat confusing and can lead to diverse interpretations. If the aim of this document is to offer clear guidelines that the States must follow in criminal proceedings, such confuse wording should be avoided. The European Parliament has pointed out this problem and has proposed to amend this article in the sense that the right to a lawyer must be granted "without undue delay and within a maximum time of 24 hours and demanding that the legal advice shall be granted before any questioning takes place and will last during the whole criminal proceedings". [12] The position of the different Member States to this provision has been everything but uniform. Some States insist that the legal assistance should be expressly recognized for the questioning by the police authorities, while others refuse the confidential interview with the lawyer before the questioning has taken place – accepting the private interview after the questioning – and therefore demand the elimination of the reference "as soon as possible". Nevertheless, there is a broad agreement on the issue that the right to legal advice should not include the right to have a lawyer present during investigations by competent authorities. [13]

Another issue that has been discussed is whether the right to a defence lawyer recognized under article 2 may be limited under certain circumstances. Several member States expressed the need to take account of laws necessary to mount an effective response to terrorism; in this context, certain States allow exceptions or temporary derogation of the right to legal advice for serious and complex forms of crime. Consequently, some States consider that the PFD should explicitly allow these exceptions to the right to legal assistance. It is worth noting that the Commission has declared that the proposed provisions of the FD are not intended to affect specific measures in force in national legislation in the context of the fight against organized crime – and particularly against terrorism. [14] However, the Commission itself and several Member States have already opposed to include such exceptions in the text of

[12] Amendment n. 15, OJ n. 033 E, 9. 2. 2006.
[13] DROIPEN 54, 21. 11. 2005.
[14] DROIPEN 28, JAI181, 19. 4. 2006.

the framework decision, although they are willing to admit some flexibility on this point.[15]

Article 4.1 PFD establishes who are entitled to act as a defence lawyer in criminal proceedings by remanding to the provisions included in the Directive 98/5/EC; article 4.2 PFD provides that the States shall make available mechanisms for ensuring a replacement of the lawyer when the legal advice given has proved to be ineffective. Here we find again a vague regulation, not easy to be implemented in practice.

The European Court of Human Rights has declared that the right to legal assistance not only consists of the right to be represented by a lawyer, but it includes also that the defence is done in an effective way.[16] As declared in *Goddi v. Italia,*[17] it is not enough that the State designates or facilitates the designation of a lawyer; the State is obliged also to ensure that the particular lawyer receives all the information needed for the defence to be effective.

There is no doubt that the defence lawyers must fulfil their tasks with the maximum zeal and diligence, and provisions in that sense are included in most legislations and rules for the bar. However, we must remark, with regard to the effectiveness of the defence, that in several Member States – as pointed out in the Green Paper on procedural safeguards – the legal assistance to the detained person is done *pro bono* by students or trainees with little or no previous experience. The Commission has tried to guarantee the right to a qualified lawyer in art. 4 of the PFD by, at least, obliging the States to provide for a mechanism of replacement in case of lack of effectiveness of the defence.

It is easy to say that the "onus must be on the Member States to establish a system for checking this"[18] – the effectiveness of the defence –, but in practice we observe many difficulties to control the compliance with this obligation, unless we agree that art. 4.2 PFD only requires that the State regulates the possibility of replacement of the designated lawyer, without further control of the quality of the defence. It is not possible to control *a priori* the effectiveness of the defence, as it is not possible to agree on which criteria should be applied to evaluate if the legal assistance is actually being effective. Only in evident cases of negligence there can be an agreement with regard to the necessity of substituting the lawyer because of his lack of quality. In most other cases, it is very difficult to monitor the effectiveness of the defence and therefore it is equally difficult to establish how it should be guaranteed by the State.

Finally, in relation to the right to legal assistance, the proposed art. 5 of the framework decision provides for legal aid in those cases where the costs would cause *undue financial hardship* for the suspect or his dependents. The right to free legal assistance in cases of insufficient economic resources is recognized in art. 6.3 ECHR, in art. 14

[15] DROIPEN 54, 21. 11. 2005.
[16] Artico v. Italy, 13 May 1980
[17] *Goddi v. Italy,* 9 April 1984.
[18] E.M., point 59.

of the 1966 International Covenant on Civil and Political Rights and in art. 55 of the Rome Statute. However, these International Covenants do not guarantee the right to legal assistance unconditionally but only when "the interests of justice require it". The elements to identify when we are in such a situation were identified by the European Court of Human Rights in *Quaranta v. Switzerland;*[19] these are the same circumstances regulated in art. 3 of the current PFD.

In our opinion the expression "undue hardship" is vague enough to be interpreted in very different ways and consequently is not very helpful to clarify when a suspect in a criminal proceeding may be entitled to legal aid. The PFD refers to the national regulation of each State and approves virtually any method to evaluate if the defendant does not have sufficient means to pay the costs of his defence. In this aspect, perhaps it would have been clearer to refer to the standards and conditions set out in the European regulation of the right to legal aid in civil proceedings.

3.2 The right to specific attention

Art. 10 PFD of the initial version of the framework decision provides that the Member States shall ensure that specific attention is paid to those suspects that cannot understand the content or meaning of the procedure owing to their age, physical or mental or emotional condition. The aim of this special protection is to promote fair trials and avoid miscarriages of justice based on the personal conditions of the suspected person.[20] The law enforcement officers should ask the suspect if he is able to understand and follow the proceedings; the officers must also record this questioning to proof that they have complied with their obligation. The only specific attention mentioned in the PFD is the medical assistance, although in the E.M there is a reference to the presence of a third person while questioning, as for example the parents if the suspect is a child.

This rule was introduced as a consequence of the answers contained in a questionnaire sent to the Member States with respect to the need of special provisions aimed at protecting suspects that are in a weak position. The general answer was positive, and the Commission included the right of special attention to those suspects that are in special circumstances. However, as it is openly recognized in the E.M., it is not easy to identify which persons do really need and therefore are entitled to special attention under arts. 10 and 11 PFD. Is a questioning by the police enough? Should be sufficient a statement of the suspected saying that he does not understand? What would occur if the suspect remains silent and nobody notices that he is unable to understand the proceedings? Does this imply that the State has to provide a special attention every time a suspected person refuses to say a word? Which would be the consequences if the police officers forget to question the suspected person about his ability to follow/ understand the proceedings? Would the whole proceeding be void in any event or

[19] *Quaranta v. Suiza,* 24 May 1991.
[20] See E.M., point 71.

would it be void only if the defence was incorrect? The wording of art. 10 PFD does not provide answers to all these questions.

On the other hand, it is also difficult to establish what kind of measures should be taken to guarantee the fairness of the trial, if a case of "special attention" is identified. We would agree on a rule that excludes the possibility of self-defence for a suspected person who is manifestly unable to defend himself properly, but it is unclear which other measures the State could be obliged to adopt in each case. Furthermore, who should bear the burden of controlling that the adequate measures are taken?

All the above mentioned questions show that the scope and extent of this right is everything but clear and therefore it does not seem to be an adequate mean to promote the compliance with fundamental rights or to enhance the visibility of procedural safeguards.

Most Member States have expressed a strong opposition against the rule granting "special attention" to certain suspects. This opposition was based not only on the the scope of this right and on the difficulty to identify the persons entitled to it, but also on the practical problems to undertake needed measures that are not defined.

We agree on the necessity to eliminate all sorts of hindrances that may affect the right to a fair trial, but on the other hand we understand the opposition against the adoption of art. 10 PFD because of the uncertainty implied in the wording of that article. We also agree with those who argue that, whatever the physical, mental or emotional circumstances of the suspected are, it is the duty of the lawyer to control that all the procedural safeguards of the defendant are respected so that no personal circumstances may affect the fairness of the trial. In my opinion, the crucial issue is to guarantee that the defendant can have a lawyer of his choice and that the he has been granted free legal assistance if he has not enough resources to pay for it. Any instrument regarding procedural rights should focus on the right to legal assistance and the mechanisms to implement it.

In any event, it is not worth continuing the analysis of the content of art. 10 PFD, for this article has been eliminated in the last drafts of the framework decision, as we will mention later.

3.3 The right to communicate

Art. 12 of the proposed framework decision deals with the right for detained persons to have his family, or persons assimilated to his family, and the employer informed about the fact of the detention. There is no specific provision in art. 12 PFD about the possibility of delaying or temporarily suspending this communication in certain cases. However, according to the explanation contained in point 15 of the framework decision, this suspension is admitted when it can be foreseen that the communication will jeopardise the criminal investigation or affect the security of a particular person. A large percentage ot national laws on criminal procedure contemplate the possibility

of delaying the exercise of the right to communicate until certain evidence is secured or other suspects detained. However, as delay in communication constitutes a limitation on a fundamental right, it is only legitimate when it is based upon sufficient ground and only for limited period of time determined by law.

The Member States have not objected to the regulation of the right to communicate, but, according to the text of the draft of the working session of 21. 11. 2005,[21] the suspect should have the right to "have a person of his choice without undue delay informed" of the arrest or detention. We fully agree with this new wording as it enlarges the scope of the right to communicate, and does not limit the communication to one of the persons within the categories initially defined. Furthermore, the European Parliament has suggested[22] that the detainee's right to inform his family or persons assimilated to his family shall be guaranteed not only to the suspected person remanded in custody, but also to the one "transferred to another place of custody" .

Art. 13 of the initial draft of the FD, following the provisions of the Vienna Convention on Consular relations of 1963,[23] guarantees to all foreign detainees the right to communicate with their respective consular authorities. It could be argued that this right is already recognized by international law, and consequently there is no need to reiterate it in the framework decision. However, it must be noted that the guarantees contained in art. 13 go beyond and are not a mere copy of the rights already recognized in the Vienna Convention. First, if the foreign detainee does not wish his home State authorities to be informed, he is entitled to communicate with an international humanitarian organisation. Second, art. 13.3 PFD expressly provides the right to consular assistance not only to the nationals of a State but also to non-nationals of an EU State if they are long-term residents. To put nationals and long-term residents at the same level with regard to the right to have consular assistance constitutes a significant innovation. Third, we should bear in mind not all the EU Member States have ratified the Vienna Convention of 1963. And finally, the inclusion of this right in the framework decision would have a positive effect: it would allow the authorities to act more effectively in case that the detainee has been deprived of his right to communicate with his consular authorities.

[21] DROIPEN 54, 21. 11. 2005.

[22] See amendment 38, OJ n. 033 E, 9. 2. 2006.

[23] See art. 36.1 of the Vienna Convention 24 April 1963.

4. Main critics against the framework decision on procedural safeguards in criminal proceedings

In brief, some of the main critics expressed against this legal instrument are the following:[24]

1) The framework decision does not correspond with the aims defined by the Commission. According to the Explanatory Memorandum, the framework decision is aimed neither at creating new rights nor at controlling the compliance with all the procedural safeguards as defined by the ECHR and other International Conventions. Its main purpose is to determine which safeguards are to be considered fundamental as well as to make them "more visible". However, the imprecise wording of many of the rules and the lack of clarity in the regulation of some important rights moves us to affirm that the framework decision does not totally accomplish the aim of visibility.
2) It has been questioned the necessity or the usefulness of a framework that only sets out a minimum standard of rights. Some States have claimed that the basic level of rights outlined in the framework decision is disappointing, for it does not increase the degree of protection of those rights. The case law of the European Court of Human Rights has played an essential role in increasing the protection of fundamental rights throughout Europe and is applicable to a range of countries wider than the Member States of the European Union. In an area of free movement as the EU, the need for judicial cooperation – in which the main applicable principle is the mutual recognition of judicial decisions – is essential, and therefore the level of mutual trust has to be greater than between countries outside the EU. It has been argued that minimum standards already exist across the European Union – namely the rights set out in the ECHR – and that the framework decision does not have any added value, but we do not agree with this objection, as we do think that a framework decision introduces better mechanisms to control the compliance with fundamental rights.
3) The existence of two parallel regulations of procedural rights has raised some concern, for it could cause confusion and lead to divergent litigation. If the framework decision has a different wording that the ECHR, the danger of conflicting jurisprudence is real and not a mere hypothesis. Therefore, the Council of Europe, although supporting the approval of the framework decision, has emphasized that the proposal should be clearer and much more compatible with the European Convention on Human Rights. As a reaction to this critic, the last draft of the proposal for a framework decision, presented under the German Presidency, is much closer to the wording of the ECHR.

[24] We do not deal with the much discussed question of the lack of legal basis of the European Union to achieve an agreement on the present framework decision, as under art. 31 EU Treaty such a legal instrument would only be justified for proceedings with cross-border elements.

4) The risk of a potential loss of the margin of appreciation that the European Court of Human Rights has generally recognized to the States. Within a criminal proceeding the decisions that may limit the fundamental rights of the suspect must be appropriate from the perspective of the principle of proportionality. Some considerations on the proportionality of an investigative measure – as the existence of a suspicion – can only be decided on the spot by the local agents and according to the legal system where the measure is to be taken. Some States consider that the framework decision could virtually eliminate the doctrine of the margin of appreciation, thus imposing to the States a harmonization of some aspects of criminal procedure far beyond the declared intention of the framework decision. Those countries that oppose to the framework decision on procedural rights do not favour an extensive interference of the EU in their criminal procedures, and thus do not agree in seeing their national margin of appreciation reduced.

5. Conclusion

It may seem surprising. and even disappointing, that the EU Member States are unable to agree on an instrument for the protection of the most basic fundamental rights of the suspect, especially considering that all of them claim to respect those rights and even guarantee a higher level of protection.

Since its approval by the Commission in 2004, the text of the proposed framework decision has been, and still is, under discussion. The negotiations to reach an agreement have not ended yet. In the working session of 19 April 2006, with the aim to overcome the deadlock of the negotiations, it was already suggested to reduce the scope of the framework decision. As a consequence of the opposition of some Member States, the initial five rights of the suspect have been whittled down to three in the draft that is currently discussed. As agreed in the JHA Council of 1 – 2 June 2006, those rights were limited to: legal assistance, free interpretation and translation, and right to be informed. This new and narrower draft endeavours to accommodate the views of some Member States that do not oppose to the framework decision but were not prepared to accept a text that would demand significant changes in their legislation on criminal procedure. The wording of the last draft recently submitted for discussion under the German Presidency is closer to the European Convention of Human Rights in order to avoid conflicts. However, even in these circumstances some Member States have suggested that it would be more sensible to work for practical measures and approve a non-binding instrument.[25] This approach is in contrast with the attitude of the Commission, which is opposed to adopting a non-binding Resolution,[26] even as an

[25] On 17 January 2007, the national delegations from Cyprus, the Czech Republic, Ireland, Malta, Slovakia, and the United Kingdom tabled the text of a non-binding resolution, with a proposal of certain "action points" containing practical measures to enhance the compliance with a minimum standard of procedural safeguards. See Eucrim, 3-4/2006, p. 62.

[26] Speech of Vice President Franco Frattini in the ERA-DE Presidency symposium, Berlin 20 February 2007.

interim measure, as it would not represent an effective measure to enhance the respect of procedural safeguards and therefore it would not help to build mutual trust.

In my opinion, and despite the possible conflict with the case law of the European Court of Human Rights, a binding instrument to ensure the compliance of the procedural safeguards in the practice of all criminal proceedings, with competence of the European Court of Justice to control the implementation of the framework decision, deserves a firm support. Against the main critics that this initiative has received, it has to be stressed that the framework decision does undoubtedly have an added value; in particular: a better control of the compliance with fundamental rights; the extension of the procedural safeguards to surrender proceedings as the procedural rights would also apply for the execution of the European Arrest Warrant; the effective fulfilment of the right to free interpreter, which is not recognized in the legislation of all Member States; a better information for the suspected person with respect to the rights he is entitled to according to the letter of rights, which in turn would also have a didactic function in all police stations of those countries with less democratic tradition; the process of harmonization that the framework decision would entail; and, last but not least, a symbolic value.

The European Union, in the context of its policies to enhance mutual trust, can not afford to transmit an image of its Member States that shows them as unable to agree on a binding instrument that defines a minimum standard of procedural rights even though these have been reduce to only three. In any event, once arrived to the point of a text that only regulates three of the fundamental rights of suspects in criminal proceedings, there are two possible approaches. One consists in supporting the binding nature of the framework decision, although being aware that its scope is perhaps too narrow. The other is to work on more practical measures, as some States have suggested. Which one of the two approaches is preferable? From my perspective, the European institutions should try their best to reach an agreement on a binding text, for this is better than nothing, even though we consider that text insufficient to ensure the existence of similar procedural safeguards in each one of the EU Member States.